

BOARD OF APPEALS CASE NO. 5064

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BEFORE THE

APPLICANT: Ginger Kilby

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ZONING HEARING EXAMINER

**REQUEST: Special Exception to allow a Personal
Care Boarding Home in the Village Residential
District; 1615 Whiteford Road, Darlington**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 6/28/00 & 7/5/00

HEARING DATE: August 9, 2000

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Record: 6/30/00 & 7/7/00

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Ginger H. Kilby, is requesting a Special Exception pursuant to Section 267-53F(8) of the Harford County Code to allow a Personal Care Boarding Home in a VR/Village Residential District.

The subject parcel is located at 1615 Whiteford Road, Darlington, Maryland 21034 and is more particularly identified on Tax Map 19, Grid 3C, Parcel 305. The parcel consists of 1.83 acres more or less and is presently zoned VR/Village Residential. The parcel is in the Fifth Election District.

The Hearing Examiner notes at the onset that upon the entry of appearance of People's Counsel in opposition to the request, the Hearing Examiner offered the Applicant an opportunity to postpone the case and obtain counsel, The Applicant declined and waived her right to counsel and elected to proceed pro se in the matter.

The Applicant, Ginger H. Kilby, appeared and testified that she operates an assisted living facility for 3 residents at this location. Each resident has his/her own room and an R/N is on staff. The Applicant delivers groceries and reviews charts. The residents have visitors as well as consults with social workers and/or representatives of the VA. None of the residents drive. She wants approval to go from 3 residents to 8 but was unable to provide the Hearing Examiner any evidence regarding impacts of 8 persons compared to 3 and/or whether additional staff would be needed. Upon questioning by People's Counsel, the Applicant admitted that she did not have a State license to operate this facility but that she had applied for one.

Case No. 5064 – Ginger Kilby

Apparently there is somewhat of a procedural snag in that the State will not issue a license for an assisted living facility like this one without proof of local zoning approval.

The Applicant operates another facility similar to this one and has not had any problems associated with that facility. She intends to operate this facility in the same manner as her other facility which has been an assisted living facility for over 10 years. The Applicant believes there is a substantial need for such assisted living facilities and that facilities such as hers contribute to the community.

Carol Bowen appeared briefly and stated that there is a need in Harford County for such facilities, particularly as the population ages.

Mr. Robert Day appeared in partial opposition to the request. While not opposed at all to the assisted living facility as configured today with 3 residents, he opposes any increase in the number of residents to 8. He is the former owner of the subject parcel and stated he was very familiar with the septic system. He indicated that at one point, 3 feet of sandy soil had to be added to maintain functionality of the septic system. Additionally, 10-15 years ago the property failed perc tests and Harford County told him that he would be unable to build on his parcel until public water and sewer were available to the site.

Mr. Anthony McClune, Chief of Current Planning for the Harford County Department of Planning and Zoning appeared and stated that the Department recommended approval of the subject request. The witness stated that the Department had conducted a thorough investigation of the request and had considered the provisions of Section 267-9I of the Code entitled Limitations, Guides and Standards and had found no impacts in that regard. Additionally, the Department was aware of the other facility operated by Ms. Kilby and gave her very high grades for that operation. In the opinion of Mr. McClune and the Department, this use at this location would not result in any material adverse impact to adjacent uses or properties and that this facility could be operated in a manner consistent with the Harford County Code.

Case No. 5064 – Ginger Kilby

CONCLUSION:

Section 267-53F(8) provides:

“Personal-care boarding homes. These uses may be granted in the AG, RR, R, R1, R2, R3, R4, RO, VB and VR Districts, provided that:

- (a) The proposed use shall be located in a single-family detached dwelling.
- (b) The proposed use meets the minimum lot size requirements for a conventional single-family residence in the district where located.
- (c) A maximum density of one (1) boarder per two thousand (2,000) square feet of lot area shall be maintained.
- (d) Adequate off-street parking shall be provided.
- (e) Where an application is for construction of a new dwelling, the building shall be similar in appearance to other single-family dwellings in the neighborhood.”

Section 267-52 provides:

- A. Special exceptions require the approval of the Board in accordance with § 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.

Case No. 5064 – Ginger Kilby

Section 267-9I provides:

“Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:

- (1) The number of persons living or working in the immediate area.**
- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.**
- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.**
- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.**
- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the county or persons to supply such services.**
- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.**
- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.**
- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.**
- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.**
- (10) The preservation of cultural and historic landmarks.”**

Case No. 5064 – Ginger Kilby

The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:

“...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption*. The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (Emphasis in original).

The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:

“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. At 15, 432 A.2d at 1327.

Case No. 5064 – Ginger Kilby

The investigation of the Department of Planning and Zoning and its findings as stated in the Staff Report dated July 27, 2000 were most helpful to the Hearing Examiner. The Hearing Examiner concludes that the proposed use at this location will have no impacts above and beyond those inherently associated with an assisted living facility regardless of its location within the zone. The Hearing Examiner is concerned, however, about the number of residents located here. The testimony of Mr. Robert Day was both credible and illuminating. Mr. Day was actually supporting the Applicant in her request to operate an assisted living facility at the proposed location but was concerned that the septic system could not handle additional residents. With that exception, the Hearing Examiner is satisfied that the Applicant has met her burden of proof.

For the reasons stated herein, the Hearing Examiner recommends approval of the Special Exception to operate a Personal Care Boarding Home at this location subject to the following conditions:

1. The Applicant shall prepare and submit to the Department of Planning and Zoning for its approval a detailed site plan which will be submitted for further review and approval by the Development Advisory Committee.
2. The Applicant will obtain a State of Maryland License to operate an Assisted Living Facility within 6 months of final approval of the Development Advisory Committee.
3. That the number of residents be limited to three (3) at this time but may be increased to eight (8) only upon the Applicant obtaining the prior approval of the Department of Health and the Department of Planning and Zoning.
4. That the Applicant obtain all necessary permits and inspections for the present number of residents as well as for any property modifications or improvement required to accommodate additional residents of the facility.

Date AUGUST 15, 2000

William F. Casey
Zoning Hearing Examiner